IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF FOR APPELLANT BERNARD CAREY

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A, pp. 1a-9a) is reported at 602 F.2d 791 (7th Cir. 1979). The opinion of the district court (J.S. App. B, pp. 11a-45a) is reported at 462 F. Supp. 518 (N.D. Ill. 1978).

JURISDICTION

The judgment of the court of appeals (J.S. App. A, p. 10a) was entered on August 2, 1979. Appellant Carey's jurisdictional statement was filed on October 31, 1979, and the Court noted probable jurisdiction on January 7, 1980. The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential purposes?

STATUTE INVOLVED

Illinois Revised Statutes, ch. 38,
§§ 21.1-1 through 21.1-3 (1967):

"§ 21.1-1. Legislative finding and declaration.] The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary.

§ 21.1-2. Prohibition—Exceptions.] It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

§ 21.1-3. Sentence.] Violation of Section 21.1-2 is a Class B misdemeanor."

STATEMENT

The appellees brought this action under 42 U.S.C. §1983 and 28 U.S.C. §§1343 and 2201. They sought a declaration that the Illinois Residential Picketing Statute, Ill. Rev. Stat., ch. 38, § 21.1-1 *et seq.* (1967), is unconstitutional on its face and as applied, and they sought to have the appellant preliminarily and permanently enjoined from enforceing the Statute. The district court upheld the Statute, but the Court of Appeals for the Seventh Circuit reversed on the ground that the Statute violates the Equal Protection Clause of the Fourteenth Amendment.

There is no dispute concerning the facts in this case. The appellees are all members of an organization called the Committee Against Racism, characterized in their amended complaint as an anti-racist activist group (A. 3a-4a). In 1977, 14 of the appellees picketed on the sidewalk in front of the single family home of the then-Mayor of Chicago, Michael A. Bilandic (A. 6a). The purpose of the picketing was to demonstrate to the Mayor that the picketers disapproved of the Mayor's failure to support busing as a means of achieving racial integration in Chicago schools (A. 6a, 13a). Thirteen of the appellees were arrested for their participation in the picketing (A. 5a-7a). Those arrested pleaded guilty to violating the Illinois Residential Picketing Statute and were sentenced to supervision (A. 7a). At the time this litigation was initiated the period of supervision had terminated for all but four of the appellees (A. 7a).

In 1978, the appellees wished to renew their picketing of Mayor Bilandic in his home to urge him to support busing (A. 7a, 14a, 15a, 16a, 18a, 20a; J.S. App. B, p. 22a). Appellant Carey conceded, and the district court found, that

if the appellees had again conducted a residential picket of the Mayor's home, they would again have been arrested and prosecuted for violating the Illinois Residential Picketing Statute (J.S. App. B, pp. 25a-26a). Rather than expose themselves to additional criminal prosecutions, the appellees filed this Section 1983 action, seeking a declaration that the Illinois Residential Picketing Statute is unconstitutional and requesting that its enforcement be enjoined (A. 10a, 11a).

Ruling on cross-motions for summary judgment supported by affidavits and briefs, the district court denied all relief (J.S. App. B, pp. 11a-45a). The district judge held that, as the appellees sought only prospective relief, he was not required to abstain from deciding the issues merely because some of the appellees had once pleaded guilty to violating the Illinois Residential Picketing Statute (J.S. App. B, pp. 12a-18a). He also held that the appellees had presented sufficient evidence to establish that there was a ripe controversy between the parties (J.S. App. B, pp. 18a-26a). On the merits, the district judge held that the Statute, both on its face and as applied, was constitutional under the First Amendment (J.S. App. B, pp. 26a-42a). Finally, the judge held that the Statute did not deprive the appellees of their equal protection rights (J.S. App. B, pp. 42a-45a). He considered that the Statute created two classifications: the classification between picketing a home and picketing a place of employment, and the classification between picketing a place of employment where a labor dispute exists and one where no labor dispute exists. The judge held that the first classification was constitutional because it furthered the state's interest in furnishing an appropriate forum for labor picketers (J.S. App. B, p. 44a, n. 18). The judge viewed the second classification as substantially identical to the clas-

sification found unconstitutional in *Police Department of the City of Chicago* v. *Mosely,* 408 U.S. 92 (1972). But the judge held that the appellees did not have standing to challenge this second classification because the Mayor's home was not claimed to be "a place of employment" (J.S. App. B, p. 45a).

The Seventh Circuit reversed. That court did not reach the First Amendment issue presented (J.S. App. A, p. 8a, n. 6). As to the equal protection issue, the court rejected the district judge's analysis of the classifications created by the Illinois Residential Picketing Statute as inconsistent with the Statute's avowed purpose of regulating residential picketing. The court held that, properly construed, the Statute *only* regulated picketing at residences, not residences *and* places of employment, and that the appellees had standing to challenge the Statute both on its face and as applied (J.S. App. A, pp. 4a-6a and 7a, n. 5). In the view of the Seventh Circuit, this Court's decision in *Mosely* compelled a finding that the Statute violated the Equal Protection Clause of the Fourteenth Amendment (J.S. App. A. pp. 6a-8a). Appellant Carey appeals from that determination.

SUMMARY OF ARGUMENT

The Illinois Residential Picketing Statute generally prohibits all residential picketing, but it permits residential picketing of homes which are also places of employment involved in labor disputes. However, this "labor dispute" exception does not render the Statute unconstitutional under the Equal Protection Clause as construed in *Police Department of the City of Chicago* v. *Mosely,* 408 U.S. 92 (1972). *Mosely* stands for the principle that any legislative scheme which makes selections among picketers must be narrowly tailored to serve a compelling state interest. *Mosely* at 98; *cf. First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785-786 (1978).

Residential privacy, the interest served by the Illinois Residential Picketing Statute is, indeed, a compelling state interest. This Court's cases have firmly established that the right to be let alone at home is a fundamental individual right, of sufficient dignity to countervail the First Amendment rights of those who would convey uninvited messages to the resident at rest in his own home. *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728 (1970); *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978).

But the right of residential privacy is a personal right which can be waived or diluted by the resident himself. When a person makes his residence into a place of employment by bringing a worker into his home, the resident voluntarily dilutes his entitlement to total residential privacy, and the state's interest in legislatively protecting that privacy diminishes *vis a vis* the worker and others who may wish to communicate with or about the worker. In effect, therefore, labor picketing at a home which is also the situs of an employment relationship is an intrusion upon residential privacy that the resident invites upon himself.

These common-sense considerations are reflected in the labor dispute exception to the Illinois Residential Picketing Statute's general ban on residential picketing. This exception tailors the prohibitory effect of the Statute to the contours of the right of residential privacy which is being protected. Therefore, the Statute is narrowly drawn to serve a substantial governmental interest, and it is constitutional under *Mosely* and the Equal Protection Clause.

ARGUMENT

INTRODUCTION

This appeal concerns the Illinois Residential Picketing Statute, the right of residential privacy, and the power of the state to prohibit picketers from making residents captive audiences in their own homes.

Years ago, Justice Black, joined by Justice Douglas, invited states to enact regulations curbing residential picketing:

> "... picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators." *Gregory* v. *City of Chicago*, 394 U.S. 111, 125-126 (1969) (Black, J., concurring).

The Illinois Residential Picketing Statute generally prohibits all residential picketing, and it was indeed enacted to protect the privacy of people at rest within their own homes, "the last citadel . . ." *See* Ill. Rev. Stat. ch. 38, §21.1-1, Legislative Finding and Declaration. Some private homes, however, also serve non-residential functions, and in recognition of this fact the Illinois Residential Picketing Statute permits picketing of residences when used for non-residential purposes. The Statute provides:

> "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of

> holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." Ill. Rev. Stat. ch. 38, §21.1-2.

This Statute is challenged by a group of civil rights activists who want to picket the homes of local political officials in order to protest the officials' policies on public issues. The district court upheld the Statute against challenges on both First Amendment and equal protection grounds. But the Seventh Circuit considered that the statutory exceptions to the residential picketing ban regulated picketing on the basis of its communicative content in violation of the Equal Protection Clause as construed in *Police Department of the City of Chicago* v. *Mosely*, 408 U.S. 92 (1972). The court observed that the *Mosely* ordinance, like the Illinois Residential Picketing Statute, contained a "labor dispute" exception to a general ban on picketing at a certain location.* Impressed by this similarity, the court could find "no principled basis of distinction" between the two regulations. *Brown* v. *Scott*, 602 F.2d 791, 794 (7th Cir. 1979).

We submit that the Seventh Circuit's view of the rule of law expressed in the *Mosely* opinion was far too narrow and failed to reflect this Court's special concern for residential privacy, a right of fundamental importance in our society. We urge that the Seventh Circuit's opinion be reversed, and that the constitutionality of the Illinois Residential Picketing Statute be affirmed.

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* The *Mosely* ordinance prohibited "[Picketing or demonstrating] . . . on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit peaceful picketing of any school involved in a labor dispute." *Mosely* at 92-93.

I.

MOSELY DID NOT CREATE A *PER SE* RULE AGAINST CONTENT-RELATED SELECTIONS AMONG FIRST AMENDMENT ACTIVITIES.

Mosely concerned an ordinance which prohibited all picketing near schools, except for labor picketing of schools involved in labor disputes. The purpose of the regulation was to promote quiet classrooms, and the state urged that it was merely a "place" restriction on picketing near schools, constitutional under well established First Amendment principles. *E.g. Cox* v. *Louisiana,* 379 U.S. 536 (1965). The Court agreed that the ordinance raised serious First Amendment problems, but, considering that the problems fell within the intersection of the First and Fourteenth Amendments, determined to analyze the case under Fourteenth Amendment principles. Because labor picketing is as potentially disruptive as non-labor picketing, the Court observed that the ordinance prohibited some, *but not all* disruptive picketing, depending upon the message being conveyed by the picketers. The Court characterized this underinclusive selection among potentially disruptive picketers as a content regulation of speech, violative of the Equal Protection Clause.

But while *Mosely* prohibited selections among picketers based on "content *alone,*" *Mosely,* at 96 (emphasis added), it did not create a new *per se* rule against all content-related selections among picketers. In fact, the opinion specifically referred to the kinds of selections or distinctions a state could properly make:

> ". . . there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands on the same place may compel the State to make choices among users and uses . . . But these justifications for selective exclusions from a public forum must be carefully scrutinized. . . . discriminations among pickets must be tailored to serve a substantial governmental interest." *Mosely* at 98.

Thus, a content-related scheme of selective exclusions of picketers, which furthers an important state interest and is carefully tailored to the contours of the particular interest being protected, is constitutional. But a content-related scheme of selective exclusions which is not adequately tailored to the particular interest being protected results in unnecessary suppression of First Amendment conduct. In the words of *Mosely,* such selections are based on "content *alone,*" and are unconstitutional. Accordingly, under *Mosely* the test of the legality of any content selective regulation of First Amendment conduct depends upon a careful examination of the particular interest the regulation seeks to advance and of the relationship between that interest and the selections made.

The operation of this test is illustrated by an examination of two of the Court's post-*Mosely* opinions in cases which, like *Mosely,* presented problems implicating both the First Amendment and the Equal Protection Clause. In *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), the Court considered a restrictive zoning plan which applied only to theaters exhibiting adult films. The Court first considered the plan under the First Amendment, which in the Court's view was not offended because the plan reasonably, and consistent with traditional First Amendment principles, regulated the "place" at which certain films could be shown. *Id.* at 62-63. However, Mr. Justice Stevens, writing for a plurality, noted that the plan operated as a content regulation of films, and therefore also

considered its constitutionality under *Mosely* and the Fourteenth Amendment. The state urged that the plan made selections among films and their exhibitors in order to preserve the character of urban neighborhoods, an interest which the plurality considered deserved "high respect." *Id.* at 71. Because the record contained sufficient facts to sustain the conclusion that the selections would have "the desired effect," the ordinance was held constitutional. *Id.* at 71.

Mr. Justice Powell, concurring, did not join in this second portion of the opinion. In his view, any restrictive effect that the zoning ordinance had on the content of films was limited to restricting the location for the exhibition of selected films. He did not analyze this problem in terms of *Mosely* and the Equal Protection Clause, but based his opinion on the First Amendment test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). While *O'Brien* did not discuss the Equal Protection Clause, its requirement that any restriction on First Amendment conduct further an important governmental interest in the least restrictive manner possible, is essentially the same as the "tailoring" requirement of *Mosely*. *Compare O'Brien* at 377, *with Mosely*, at 98.

Two years after *Young*, the Court considered a state criminal statute which imposed severe limitations on corporate "free speech" by prohibiting the expenditure of corporate funds to publicize the corporation's views on any referendum issue not materially affecting the interests of the corporation. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). The Court recognized that the statute was a blatant content-selective restriction of

"pure" speech.* Nevertheless, the regulation could have survived constitutional scrutiny under both the First and the Fourteenth Amendments if it had been "intimately related" to a compelling state interest. *Id.* at 785-786. Upon close analysis, however, the Court concluded that the regulation was not at all related to the state's first asserted interest: that of preserving the integrity of the electoral process. As to the state's other avowed purpose of protecting corporate shareholders, the Court found that the regulation was both underinclusive, (as the *Mosely* ordinance had been), in permitting some but not all corporate political activity, as well as overinclusive in prohibiting even expenditures endorsed by *all* the corporation's shareholders. Accordingly the statute was unconstitutional under both the First Amendment and the Equal Protection Clause.**

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* The Court also noted that the content selections made in the statute were especially odious to the First Amendment because they were suppressive of "one side of a debatable public question . . ." *Id.* at 785. By contrast, the content selections made in the zoning ordinance considered in *Young* v. *American Mini Theatres*, *supra*, 427 U.S. 50, turned on the *subject matter* of the restricted films, and were wholly neutral as to point of view. *Id.* at 70.

** These opinions are entirely consistent with the Court's other recent cases treating content based selections among communications and communicators. *E.g. Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (upholding the selective exclusion of political advertisements from public buses); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (both upholding regulations which limited government employees' political activities but not their other, non-political activities); *Greer* v. *Spock*, 424 U.S. 828 (1976) (upholding military installation's regulations which subjected partisan political activity to restrictions not imposed on non-political activities, because the regulations furthered the authorities' interest in main-

(Footnote continued on following page)

The foregoing cases, including *Mosely,* teach that the point of departure for the analysis of the Illinois Residential Picketing Statute, or any regulation which selectively restricts First Amendment activity, is a careful examination of the particular interest the Statute seeks to further.

II.

THE ILLINOIS RESIDENTIAL PICKETING STATUTE, AS TESTED UNDER *MOSELY*, IS NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST.

In analyzing the Illinois Residential Picketing Statute the Seventh Circuit focused only upon the similarities between the exception clauses in that Statute and the *Mosely* ordinance. We submit that this was a crucial error, for

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continued:

taining the political neutrality of the military establishment); *City of Madison* v. *Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976) (holding that the state's permitting one teachers' representative but not another to address an open school board meeting was an unconstitutional content selection because it was unrelated to the state's interest in regulating public employee contract negotiations).

In an early picketing case, *Cox* v. *Louisiana,* 379 U.S. 559 (1965), the Court upheld an ordinance which prohibited picketing around a courthouse when the picketers' messages were aimed at the judicial process. However, the Court conceded that the ordinance did not prohibit picketing at the same courthouse targeted at a non-judicial city officer "who just happened to have an office located in the courthouse building." *Id.* at 567.

Finally, labor picketing cases traditionally draw distinctions among picketers based upon the relationship between the messages on the picket signs and the state and federal interests at stake. *E.g. NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local* 760, 377 U.S. 58 (1964) (consumer picket targeted at struck product, rather than secondary employer legal under National Labor Relations Act); *see also Internat'l Brotherhood of Teamsters, Local* 695, *A.F.L.* v. *Vogt, Inc.,* 354 U.S. 284 (1957), and the cases discussed therein.

the *Mosely* ordinance and the Illinois Residential Picketing Statute were aimed at protecting very different state interests. The *Mosely* ordinance sought to promote quiet public school classrooms. The Illinois Residential Picketing Statute was enacted to ensure residential privacy. These interests are profoundly different, and the differences supply the primary reason for reversing the Seventh Circuit's decision.

As the Court commented in *Mosely,* the state's interest in preventing classroom disruption is "substantial," *Mosely* at 99, but that interest is generally subordinated to the First Amendment rights of others. *E.g. Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969). By contrast, the right of residential privacy is fundamental in our society, and when conflicts arise between residential privacy and other rights—even exalted First Amendment rights—residential privacy is generally protected above all else. *See generally FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978).

A. Residental Privacy Is A Right Of Fundamental Importance.

The right of residential privacy is the right of every person to be let alone within his own home, unassaulted by uninvited communications. *See FCC* v. *Pacifica Foundation, supra.* It is a right which has not often been the focus of federal constitutional adjudication, for, as the Court recognized many years ago, its protection is "left largely to the law of the individual states." *Katz* v. *United States,* 389 U.S. 347, 350-351 (1967). Nevertheless, judges and commentators alike agree that the right is entitled "the greatest solicitude" in the constitutional scheme of things. *Pacifica Foundation, supra,* 438 U.S. at 764 (Bren-

nan, J., dissenting); *see generally* Chafee, Free Speech in the United States, 406 (1954), cited in *Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U.S. 610, 619 (1976). Indeed, the Court's solicitude for residential privacy has been a theme underlying many of its opinions.

For example, Fourth Amendment doctrine was shaped by considerations of residential privacy, a "sacred right." *Boyd* v. *United States,* 116 U.S. 616, 630 (1886). In fact, early search and seizure cases treated the Fourth Amendment as simply embodying the fundamental maxim that "a man's house is his castle." *See Weeks* v. *United States,* 232 U.S. 383, 390-393 (1914). Contemporary cases recognize that Fourth Amendment protections extend well beyond the home. *E.g. United States* v. *Chadwick,* 433 U.S. 1 (1977). Nevertheless, it is the right of residential privacy which fortifies the constitutional barrier to warrantless arrests in the home, *Johnson* v. *United States,* 333 U.S. 10, 14 (1948), and warrantless searches of homes by health inspectors, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and peace officers, *Weeks* v. *United States, supra.*

Considerations of residential privacy support zoning laws which impact adversely on First Amendment associational rights. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). The right to be let alone at home has been an important factor in the Court's procreative activity privacy cases. Taking its cue from Justice Harlan's often cited dissent in *Poe* v. *Ullman,* 367 U.S. 497, 550 (1961), the Court has consistently recognized residential privacy, rooted in the Fourth and Fourteenth Amendments, as one constitutional source for personal sexual privacy. *E.g. Griswold* v. *Connecticut,* 381 U.S. 479, 484-486 (1965); *Roe* v.

Wade, 410 U.S. 113, 153-154 (1973); *and see Stanley* v. *Georgia,* 394 U.S. 557 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch." *Id.* at 565.)

The Court has also been solicitous of residential privacy when called upon to resolve direct conflicts between that right and First Amendment rights of those who would send messages into the home. Among contemporary decisions, the first such direct conflict was presented in *Martin* v. *Struthers,* 319 U.S. 141 (1943), in which the Court struck an ordinance banning all door-to-door leafletting, while nevertheless recognizing that residents have protectable privacy interests in the quiet and peaceful enjoyment of their homes. *Id.* at 143-144. Indeed, in the later case of *Breard* v. *City of Alexandria, La.,* 341 U.S. 622 (1951), these privacy interests were held to outweigh the rights of commercial vendors who sought to engage in door-to-door solicitation. Recently the Court invalidated another solicitation ordinance, this time on vagueness grounds. *Hynes* v. *Mayor and Council of Borough of Oradell, supra,* 425 U.S. 610. But the Court unambiguously suggested that a properly drawn ordinance, enacted "to protect the peaceful enjoyment of the home," would be constitutional. *Id.* at 619-620.

An important aspect of the right of residential privacy is that it implicates the captive audience doctrine, which recognizes that while the First Amendment generally requires that persons be permitted to speak, it does not force intended targets to listen. The Court first enunciated this doctrine in *Packer Corp.* v. *Utah,* 285 U.S. 105 (1932), in which a statute regulating the content of outdoor display advertising withstood Fourteenth Amendment and

Commerce Clause challenges. The Court noted that, unlike other forms of advertising, billboards are "constantly before the eyes of observers on the streets and in streetcars to be seen without the exercise of choice or volition on their part." *Id.* at 110.

Years later the captive audience doctrine was the key to an important decision regarding the First Amendment problem raised by an ordinance banning loud, raucous sound-trucks from broadcasting on city streets. *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). While recognizing that the content of the broadcasts was protected, the Court nevertheless upheld the ordinance. The unwilling listener, the Court reasoned, cannot avoid hearing the loud broadcast. "In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers . . ." *Id.* at 87. Despite the breadth of this pronouncement, however, personal privacy and the captive audience doctrine were rejected, just three years after *Kovacs,* as grounds for prohibiting commercial radio broadcasts on public buses. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451 (1952). But the Court noted this significant distinction: "However complete . . . [a citizen's] right of privacy may be *at home,* it is substantially limited by the rights of others when its possessor travels on a public thoroughfare . . ." *Id.* at 464 (emphasis supplied).

Finally, in 1970, the Court was presented with facts which squarely implicated both residential privacy rights and the captive audience doctrine. In *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728 (1970), the Court upheld a regulation which permitted addressees to direct the Postmaster not to deliver pandering advertisements. Speaking for a unanimous Court, Chief Justice Burger declared:

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even good ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Id.* at 738.

Opinions following *Rowan* treated as established beyond cavil the right of residential privacy as endowing the resident with the power to censure all uninvited communications. *E.g. Cohen* v. *California,* 403 U.S. 15, 21 (1971); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 208 (1975); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 95 (1977). In *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1975), the Court overturned an injunction against pamphleteering in the neighborhood of a real estate broker as an unconstitutional prior restraint. But the Court carefully distinguished *Rowan.* Pamphleteering in a neighborhood did not violate the broker's right of residential privacy because he "is not attempting to stop the flow of information into his own household, but to the public." *Id.* at 420.

The Court's most recent residential privacy decision was *FCC* v. *Pacifica Foundation, supra,* 438 U.S. 726, in which the Court held that a radio station could be censured for the broadcast of words which were indecent but not obscene. The Court considered that the broadcast media presents special First Amendment problems because its messages travel directly into "the privacy of the home,

where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748. The decision also emphasized the importance of the captive audience aspects of the problem presented. Unlike the unwilling audience on the street, the captive listener at home should not bear the burden of "turning away" or "absorbing the first blow," *id.* at 748 and 759, for "a different order of values obtains in the home." *Id.* at 759 (Powell, J., concurring).

Surely, if under *Rowan* a resident is entitled to prevent an intrusion into his privacy as minor as unwanted mail, he has a right to prevent intrusions as major as unwelcomed picketers. Surely, if under *Pacifica Foundation* the state may censure an invasion of residential privacy as minimal as a radio broadcast of common street language, the state can seek to prohibit, by its criminal laws, an invasion as threatening as uninvited residential picketers. Clearly if a balance must be struck between the rights of picketers and residents, the scales must tip toward the residents. Picketers who are prohibited from residential picketing can picket their targets elsewhere. The picketed resident, however, has no way to protect his privacy before it is invaded by residential picketers, and he has no remedy with which to assuage himself after his privacy is destroyed. As Justice Douglas once noted, "Once privacy is invaded, privacy is gone." *Public Utilities Comm'n* v. *Pollak, supra,* 343 U.S. at 469 (Douglas, J., dissenting). Truly, of all captive audiences the picketed resident is the most vulnerable, for having retreated to his home he has retreated as far as possible and yet has not achieved quiet and privacy.

B. The Illinois Residential Picketing Statute's Selections Among Picketers Are Intimately Related To The Right Of Residential Privacy.

In the broadest sense *Pacifica Foundation* and its predecessor cases reflect a social judgment. It is more important to protect the home as a "last citadel of the tired" than to protect those who would send unwanted messages into the home. On the street it is the communicator who receives special consideration, *e.g. Cohen* v. *California, supra,* 403 U.S. 15, but in the home the resident is protected above all.

Nevertheless, the right to be let alone at home is a personal right and as such may be waived or diminished by the resident himself when he invites outsiders into his home for public, non-residential purposes. Where a private home is also used as a business, a place of employment or a public meeting place the balance between the privacy rights of the resident and the First Amendment rights of those who would transmit uninvited messages into the home may tip in favor of the communicator.

These common-sense considerations are reflected in the exceptions to the Illinois Residential Picketing Statute's prohibition of residential picketing. Other than allowing persons to picket their own homes, the Statute allows no picketing whatsoever of homes used only as homes. But when a residence is used also for a public purpose, its functions are expanded beyond those of a mere private home whose security, peace and privacy are of overriding legislative and constitutional concern.

It is well established that legislatures have broad latitude to regulate on a selective basis in order to protect captive audiences, such as picketed residents. "In such situations," the Court explained in another captive audi-

ence case, "the legislature may recognize degrees of evil and adopt its legislation accordingly." *Lehman* v. *City of Shaker Heights, supra,* 418 U.S. at 302. Nevertheless, the Seventh Circuit was unimpressed by both this precedent and by the Illinois legislature's sensitivity to the competing interests which may be affected by a restriction on residential picketing. It held that the labor dispute exception rendered the Residential Picketing Statute unconstitutional because a similar labor dispute exception had rendered the *Mosely* ordinance invalid. *Brown* v. *Scott, supra,* 602 F.2d at 794. But this rigid analysis cannot withstand scrutiny.

The intensity of the state's interest in preserving quiet classrooms does not vary depending upon whether the picketed school is also a "place of employment." Every school, by definition, is the situs of its teachers' employment relationships. By contrast, the intensity of the state's interest in preserving residential privacy is directly related to whether the target residence is also a "place of employment." The *only* homes that are the situs of employment relationships are those in which the resident has chosen to hire domestic help or home repairmen. But by the mere act of bringing a worker into his home, the resident voluntarily dilutes his entitlement to total residential privacy, and the state's interest in legislatively protecting that privacy logically diminishes *vis a vis* the worker and others who may wish to communicate with or about the worker. Allowing that worker or a labor organization to picket the resident when a labor dispute arises permits an intrusion upon residential privacy that the resident has invited upon himself.

In other words, there was *no* reasonable relationship between the labor dispute exception in *Mosely* and the contours of the state's interest in protecting quiet classrooms: either labor or non-labor picketing would have adversely affected that interest. But there is a necessary correlation between the labor dispute exception in the Illinois Residential Picketing Statute and the contours of the state's interest in protecting residential privacy: all residential picketing adversely affects residential privacy, but only labor picketing at a home which is also a place of employment adversely affects an interest in privacy *which has already been diminished by the resident himself.**

Therefore the Seventh Circuit's holding that there is "no principled basis of distinction" between the *Mosely* ordinance and the Illinois Residential Picketing Statute is erroneous. The distinctions between labor and non-labor picketers drawn by the *Mosely* ordinance were unrelated to the interest that the statute sought to protect. But the distinctions drawn by the Illinois Residential Picketing Statute are carefully molded and intimately related to the boundaries of the right to residential privacy.

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* In addition to allowing labor picketing, the Illinois Residential Picketing Statute provides that a person may picket his own home, and the Statute permits picketing of homes which are also places of business or places of holding public meetings. The Seventh Circuit did not consider these provisions, but was concerned only with the labor dispute exception to the general ban on residential picketing. *Brown* v. *Scott, supra,* 602 F.2d at 795, n. 6. We submit, however, that these additional exceptions, like the labor dispute exception, represent circumstances in which the resident waives or dilutes his right to residential privacy, either by making his home in a building which serves residential and non-residential functions, or by using his home for a public, non-residential function, or by picketing it himself. Accordingly, these exceptions are selections among residential picketers which, like the labor dispute exception, are molded to the boundaries of the right of residential privacy and are constitutional under *Mosely* and the Equal Protection Clause.

CONCLUSION

In *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. 50, Mr. Justice Stevens cautioned lower courts against overly zealous application of *Mosely* without consideration of the principle for which *Mosely* actually stands:

> "This statement, [from *Mosely*], and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." *Id.* at 64-65.

The Court urged that lower federal courts be especially alert lest undue reliance upon *Mosely* result in unnecessarily striking state schemes which protect important state and individual interests. *Id.* at 72.

We submit that in considering the Illinois Residential Picketing Statute the Seventh Circuit ignored the warning of *Young,* and struck a legislative scheme which, upon close analysis, is constitutional under *Mosely* because it protects residential privacy, a fundamental individual right, by regulating residential picketing with requisite sensitivity to the competing interests affected.

For all the reasons stated above we urge that the decision of the Seventh Circuit be reversed, and that this Court

hold the Illinois Residential Picketing Statute constitutional under the Equal Protection Clause.

Respectfully submitted,

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